Hastings Law Journal

Volume 67 | Issue 6 Article 6

8-2016

Simplicity v. Reality in the Workplace: Balancing the Aims of Vance v. Ball State University and the Fair Employment Protection Act

Elizabeth Lee

Simplicity v. Reality in the Workplace: Balancing the Aims of *Vance v. Ball State University* and the Fair Employment Protection Act

ELIZABETH LEE*

Under Title VII of the Civil Rights Act of 1964, an employer can be held liable for harassment or discrimination by a supervisor. In 2013, in Vance v. Ball State University, *the Supreme Court narrowed the definition of supervisor, limiting victims' ability to prevail on vicarious liability claims. In response, Congress proposed the Fair Employment Protection Act ("FEPA"), which sought a return to the broader, pre-*Vance *definition of supervisor. While Congress has been successful in overriding decisions inconsistent with Title VII's aims in other contexts, FEPA did not gain enough momentum and eventually failed. As a result, the* Vance *decision stands, posing an obstacle to many employees whose harassers were not supervisors, but still controlled nearly every aspect of their daily work.*

*Arguing that neither the pre- nor the post-*Vance *definition of supervisor fully recognizes workplace realities, this Note proposes a tiered liability structure based on the actual workplace dynamic between harasser and victim. This broader structure reaches harassment by those with the apparent authority to take tangible employment actions. This additional category is important because, if an employee is not aware of a superior's authority or has reason to believe that her harasser can fire or demote her, it does not matter whether the harasser actually has the authority to do so. However, if employers have exercised reasonable care in preventing or correcting harassment, this structure provides for an affirmative defense against vicarious liability. Further, the structure applies a negligence standard to harassment by coworkers or those who are clearly day-to-day supervisors.*

As the workplace continues to take on new forms, this structure would allow employers to minimize liability through clear employee structuring and proper training; victims to seek redress through the category that most aptly reflects their harassers' authority over them; and courts to more accurately evaluate supervisory status and liability. In effect, this structure can improve efficiency and accuracy throughout the litigation process.

---

* J.D. Candidate, 2016, University of California, Hastings College of the Law; Executive Notes Editor, *Hastings Law Journal*; B.A., 2012, University of San Diego. My sincerest gratitude to Professor Michelle Travis of the University of San Francisco for her perspective and support throughout this experience and for helping me to articulate my vision for this Note. I would also like to thank *Hastings Law Journal* Notes editors, Mohneet Dhaliwal, Regina Durr, and Traci Aoki, and the entire Production Department for their outstanding work. It has been a great privilege to work alongside all of you. Lastly, thank you to my loving parents, Patrick and Nancy Lee, for their unwavering confidence in me. It is because of you, and the values you have instilled in me, that I have reached this point in my life and career.

TABLE OF CONTENTS

INTRODUCTION

In the midst of the countless complexities and nuances governing today's legal system, meritorious claims may nevertheless succeed or fail on the interpretation of a *single* word. Holding substantial interpretive power, courts have the authority and the opportunity to dictate the future path of the statute at hand. Through the practice of statutory interpretation, courts can choose to either honor or set aside the underlying aims of the legislation in question. The way in which many courts have interpreted Title VII of the Civil Rights Act of 1964 ("Title VII")[1] exemplifies this judicial discretion.

Under Title VII, it is an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his

1. 42 U.S.C. § 2000e (2013).

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[2] However, Title VII's strength is diminished when courts interpret it in a manner that limits protection for employees. By displacing the aims of Title VII, courts not only inhibit plaintiffs' opportunities for redress, but also dismiss Congress' efforts to address the ever-present problems of workplace discrimination and harassment. With the "realm of the workplace"[3] constantly changing, courts and Congress must communicate to ensure that employers and the judicial system effectuate Title VII in the modern workplace.

Where the outcome of a case can turn on the definition of a single word, courts should carefully consider the impact of, and reaction to, its impending decision, including a possible response from Congress. If Congress chooses to override a judicial interpretation, it should proceed carefully and thoughtfully, upholding the aims of Title VII without rejecting the courts' justification for a narrow interpretation out-of-hand.

Recently, one such conflict between the judicial and legislative branches arose over the definition of "supervisor," significantly impacting employees' ability to bring claims under Title VII. In *Vance v. Ball State University*, the success of Maetta Vance's claim for harassment in the workplace hinged on the courts' interpretation of the term supervisor in the context of vicarious liability under Title VII.[4] In *Vance*, the Supreme Court held that vicarious liability would only extend to employers who had "empowered th[e harassing] employee to take tangible employment actions against the victim, that is, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[5]

To arrive at this narrow interpretation, the Court rejected the Equal Employment Opportunity Commission's ("EEOC") broad definition of a supervisor as either "(1) an individual authorized 'to undertake or recommend tangible employment decisions affecting the employee,' including 'hiring, firing, promoting, demoting, and reassigning the employee'; [sic] *or* (2) an individual authorized 'to direct the employee's daily work activities.'"[6] With the latter EEOC definition now removed from the analysis, the Court adhered to the pro-employer side of a circuit split, creating a significant roadblock for employees who are harassed by a

2. *Id.* § 2000e-2(a)(1).

3. Martha Chamallas, Lecture, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 162–63 (2013).

4. Vance v. Ball State Univ., 133 S. Ct. 2434, 2441 (2013).

5. *Id.* at 2443 (citation omitted).

6. *Id.* at 2455 (citation omitted).

superior without this narrow range of authority.[7] As a result, the Court's definition of supervisor redrew the line between vicarious and negligence-based liability in determining employer liability for harassment in the workplace under Title VII. Soon thereafter, members of Congress drafted the Fair Employment Protection Act ("FEPA") in direct response to the *Vance* decision.[8] The legislation proposed a return to the EEOC's broader definition of supervisor, but ultimately died in Congress, leaving a broad range of employees unable to seek redress under the theory of vicarious liability for harassment in the workplace.[9]

This Note proposes a response to the Court's holding in *Vance* that would address the practical and public policy concerns voiced by both pro-employee and pro-employer advocates. Part I provides an overview of the *Vance* decision and the proposed FEPA legislation. Part II describes the pattern of congressional overrides in Title VII's history, which provides context for the discussion of the *Vance* decision and FEPA. Part III discusses why FEPA would not have been successful in accomplishing Congress' goals due to likely resistance from courts and employers. Part IV highlights the successes and failures of both the *Vance* decision and FEPA, suggesting ways in which a middle ground approach could address the concerns of the Court and Congress regarding modern-day business, judicial concerns, and the harsh realities that victims of harassment face. Finally, Part V proposes a solution in the form of a tiered structure of liability based on the designation of the harasser in one of four categories. The underlying purpose of this proposal is to better facilitate courts' and employers' acceptance and implementation of a congressional override as it applies to employer liability under Title VII.

I. Background

Under Title VII, the question of whether the harasser was or was not her victim's supervisor directly impacts the victim's ability to hold her employer vicariously liable for the harm suffered. The *Vance* Court limited the scope of the supervisory authority for these purposes, and the

7. Catherine L. Fisk, Special Issue on Circuit Splits, *Supervisors in A World of Flat Hierarchies*, 64 Hastings L.J. 1403, 1406 (2013) ("The circuits have clearly split on who constitutes a supervisor under Title VII, with the Seventh and Eighth Circuits having taken a relatively extreme position that only those who have the actual power to hire, fire, demote, transfer, and discipline workers are supervisors, and other circuits having accepted the Equal Employment Opportunity Commission's ('EEOC') position that a Title VII supervisor includes one who has the authority to direct another employee's daily activities, workload, or tasks.").

8. Fair Employment Protection Act of 2014, H.R. 4227, 113th Cong. § 2(b) (2d Sess. 2014).

9. *See H.R. 4227 (113th Cong.): Fair Employment Protection Act of 2014*, GovTrack, https://www.govtrack.us/congress/bills/113/hr4227 (last visited Aug. 5, 2016); *see also S. 2133 (113th Cong.): Fair Employment Protection Act of 2014*, GovTrack, https://www.govtrack.us/congress/bills/113/s2133 (last visited Aug. 5, 2016).

proponents of FEPA were unsuccessful in achieving a return to a broader definition. Examining the decision and the legislation more closely will shed light on where the judicial and legislative branches differed in their views of Title VII.

A. *VANCE V. BALL STATE UNIVERSITY*

Maetta Vance ("Vance"), an African-American woman employed at Ball State University ("the University") as a catering assistant, alleged that Saundra Davis ("Davis"), a University catering specialist, had harassed her by directing racial slurs and threats towards her and engaging in behavior that included "glaring at her, slamming pots and pans around her, and intimidating her."[10] After Vance complained to management, who instructed the two employees to "respect" one another, the harassment worsened as the taunting, racial slurs, and threats continued.[11] Ultimately proceeding to litigation, Vance alleged that the University was vicariously liable for Davis' "creation of a racially hostile work environment" because she was Vance's supervisor.[12] The parties agreed that Davis could not take "tangible employment actions," like hiring or firing, against Vance.[13] Unfortunately, this characterization of Davis' authority ultimately led to the defeat of Vance's claim when the U.S. Supreme Court determined that for a vicarious liability action to stand, the harasser must have the authority to take "tangible employment action."[14] Affirming the Seventh Circuit and district court, the Court held that the University was not liable for Davis' actions because Davis was not Vance's supervisor and Vance could not otherwise prove the University's negligence.[15]

This trajectory from serious and repeated workplace harassment by an alleged supervisor, to an unfavorable outcome for the victim is not unique to *Vance*. As discussed in further detail below, many employees have alleged meritorious claims of verbal, physical, and sexual harm, only to have the success of their vicarious liability cases turn on the court's opinion of whether the harasser constituted a supervisor.[16] For

10. *Vance*, 133 S. Ct. at 2439. *See* Vance v. Ball State Univ., No. 1:06-cv-1452-SEB-JMS, 2008 WL 4247836 (S.D. Ind. Sept. 10, 2008); Brief for Petitioner at 6, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556).

11. Brief for the Petitioner at 7, 9, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (No. 11-556).

12. *Vance*, 133 S. Ct. at 2440 (citation omitted).

13. *Id.* ("The [district] court explained that BSU could not be held vicariously liable for Davis' alleged racial harassment because Davis could not "'hire, fire, demote, promote, transfer, or discipline'" Vance and, as a result, was not Vance's supervisor under the Seventh Circuit's interpretation of that concept." (citation omitted)).

14. *See id.* and text accompanying note 13.

15. *Id.* ("The [Seventh Circuit] concluded that Davis was not Vance's supervisor and thus that Vance could not recover from BSU unless she could prove negligence. Finding that BSU was not negligent with respect to Davis' conduct, the court affirmed." (citation omitted)).

16. *See infra* Parts IV.C, D, V.B.

those who never pursue reporting or litigating workplace harassment for fear of retaliatory action or financial instability, the *Vance* standard makes the decision to pursue these avenues all the more risky.

B. The Fair Employment Protection Act

Reacting to the Court's decision in *Vance*, members of Congress introduced FEPA, calling for a return to the EEOC's broad two-part definition of supervisor, which extends vicarious liability to actions by supervisors who can pursue tangible employment actions and supervisors who can direct day-to-day activities.[17] Under the EEOC's broader definition of supervisor, vicarious liability arises from harassment by "(1) an individual with the authority to undertake or recommend tangible employment actions affecting the victim of the harassment; or (2) an individual with the authority to direct the victim's daily work activities."[18]

Several concerns motivated this reaction from both chambers of Congress.[19] Senator Tammy Baldwin noted, "workplace harassment remains an unacceptable reality that threatens the economic security of far too many people, particularly women."[20] Representative George Miller took issue with the *Vance* decision because it "made it harder for victims of unlawful and insidious harassment to hold their employers accountable."[21] In further criticism, Representative Rosa DeLauro expressed that the decision "reinforced the Roberts Court's reputation as the most anti-worker Supreme Court[] in our nation's history."[22] Further concern arises because employers can now strategically utilize this narrow approach to their benefit and their employees' detriment. Nancy Zirkin, Executive Vice President of The Leadership Conference on Civil and Human Rights, affirmed this concern, explaining that "[b]y redefining 'supervisor' to exclude the managers that interact with workers on a day-to-day basis, the Supreme Court has given corporations and middle management a free pass to skirt liability for abusing employees and lowered penalties for when they're found guilty."[23] Overall, the Court's narrow definition undermined the protections afforded in earlier cases[24] and "ignore[d] the reality that employees with the authority to control their

17. Fair Employment Protection Act of 2014, H.R. 4227, 113th Cong. § 2(b) (2d Sess. 2014).

18. *Id.*

19. *See* Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Harkin, Baldwin, Miller, DeLauro Introduce Bill to Fight Workplace Harassment: "Fair Employment Protection Act" Restores Workplace Protections (Mar. 13, 2014).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (exemplifying how the narrow definition of "supervisor" undermines workplace protections).

subordinates' daily work . . . are aided by that authority in perpetuating a discriminatory work environment."[25]

The proponents of FEPA advocated for a return to the EEOC definition due to concern with the *Vance* decision's negative impact on victims' ability to seek redress for workplace harassment suffered. Despite their intention to uphold the spirit of Title VII,[26] Congress ultimately did not enact FEPA,[27] which essentially reverted to the EEOC's previous interpretation, and further failed to contemplate any of the rationales, as expressed in *Vance*, for narrowing the definition of supervisor. For example, the *Vance* majority had discussed certain aspects of the modern workplace (such as less hierarchical employee structures and increasingly shared responsibilities) and of the judicial system (such as the likelihood of jury confusion when complex jury instructions are used) as modern-day rationales for its decision. However, the FEPA drafters ignored these, and other valid considerations.[28] In doing so, Congress chose an ineffective course of action. Specifically, when employers' and courts' legitimate concerns are left unaddressed, Congress runs the risk that its proposed policies[29] might not be strong enough to withstand resistance from courts and employers that prefer the simplicity of *Vance*'s singular definition of supervisor.

Within the realm of Title VII, the Court and Congress have engaged in a pendulum-like dialogue. Generally, this back-and-forth begins when the Court arrives at a narrow interpretation of the law and, in reaction, Congress quickly responds with sweeping legislation that fails to incorporate practical considerations. Next, holding steadfast to less progressive interpretations of Title VII, courts and employers refuse to accept the congressional response in full. As discussed in Part III of this Note, Congress' efforts are often challenged because employers refuse to revise their practices to reflect pro-employee changes, and courts continue to apply precedent as they choose, even if doing so conflicts with the new legislation. Drafted less than one year after the *Vance* decision, FEPA is an example of Congress' pattern of reverting to a previous interpretation under the law, and essentially ignoring the Supreme Court's holding.

This repeated interaction between the branches and other actors suggests that there may be an unrealized opportunity for Congress to

---

25. Fair Employment Protection Act of 2014, H.R. 4227, 113th Cong. § 2(a)(11), (14) (2d Sess. 2014). This notion that supervisory authority aids employees who harass others partially lays the groundwork for the proposed second category discussed in Part V.B.

26. *See* U.S. Senator Tammy Baldwin, *The Fair Employment Protection Act: When Our Workers Have the Opportunity to Success*, AM. SUCCEEDS, https://www.baldwin.senate.gov/imo/media/doc/FairEmploymentProtectionActBckrnd.pdf (last visited Aug. 5, 2016).

27. *See* all sources cited *supra* note 9.

28. *See generally* Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (discussing these realities).

29. *See, e.g.*, H.R. 4227 (discussing the need to protect low-wage workers).

respond thoughtfully to the Court's decisions in times of disagreement, so that it can establish real-world solutions that courts and employers will not subsequently resist. The fact that FEPA never became a reality suggests that there was a missed opportunity to modernize the understanding of vicarious liability under Title VII in a way that is agreeable to employees, employers, and their respective advocates, alike.

II. A Repeating Pattern Sought to Be Repeated Again

Central to this dialogue is Title VII, which deems it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[30] As interpreted, Title VII has been held, more specifically, to prohibit discrimination in employment decisions with direct economic consequences; the creation of a hostile work environment; and discriminatory acts carried out by employers' agents.[31] The Court took a step towards de-privatizing harassment and placing it "squarely within the realm of the workplace"[32] when it recognized for the first time that a harasser's creation of a hostile environment can affect the victim as well as other coworkers.[33] The *Vance* decision, however, indicates that the Court is not always willing to de-privatize harassment to the fullest extent necessary to protect victims. Congress' response in FEPA further suggests that the dialogue over the proper definition of supervisor has not yet ended.

Regarding this dialogue between the judicial and legislative branches, Congress has repeatedly overridden the Court's decisions, particularly in the context of Title VII. A congressional override has been defined as legislation that:

> (1) completely overrules the holding of a statutory interpretation decision, just as a subsequent Court would overrule an unsatisfactory precedent; (2) modifies the result of a decision in some material way, such that the same case would have been decided differently; or (3) modifies the consequences of the decision, such that the same case would have been decided in the same way but subsequent cases would be decided differently.[34]

Two associated studies have examined these overrides, identifying six common factors among the underlying, and ultimately overridden,

30. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2013).

31. *Vance*, 133 S. Ct. at 2440–41; 42 U.S.C. § 2000e-2(b) (2013).

32. Chamallas, *supra* note 3, at 162–63.

33. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

34. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 332 n.1 (1991).

Supreme Court decisions.[35] Statistically, the factors most commonly correlated with overrides of the Court's statutory interpretation include:

> (1) close division (plurality or 5- or 6-Justice majority) among the Justices when deciding the case; (2) judicial rejection of the interpretation offered by a federal agency and usually defended by the Solicitor General; (3) judicial narrowing of federal regulation, except in tax and intellectual property cases, where regulation-friendly interpretations are often overridden; (4) reliance on plain meaning of statutory texts, especially when such reliance depends critically on whole act and whole code arguments or flies in the face of strong legislative history; and (5) invitations for Congress to override, issued by majority, concurring, or even dissenting Justices.[36]

Further analysis of the most highly publicized overrides has demonstrated that there is a subset of "restorative" overrides through which Congress seeks to "restore" its interpretation of statutory law—an interpretation that is often also shared by the implementing agency but rejected by the Court.[37] This repeating pattern of restorative overrides is particularly prevalent at the crossroads of antidiscrimination law and employment law.[38] For example, the Pregnancy Discrimination Act of 1978[39] and the Lilly Ledbetter Fair Pay Act of 2009[40] are two prominent congressional efforts in response to Supreme Court decisions that were criticized for curtailing minorities' and women's rights under Title VII by way of narrow interpretation.[41] Similarly, FEPA set out to override *Vance* and restore the EEOC's pro-employee interpretation of supervisor. Drawing this parallel, Representative DeLauro noted that, in *Vance*, a slim five-four majority once again "struck at the heart of longstanding civil rights laws," "[j]ust as [it] did with Lilly Ledbetter's case."[42]

There are several key examples in Title VII's history that best illustrate the dynamics of this override system. For example, the Court's decision in *General Electric Co. v. Gilbert*,[43] which interpreted Title VII to allow pregnancy-based employment discrimination, prompted a restorative override—the Pregnancy Discrimination Act of 1978.[44] The *General Electric Co.* decision reflected the factors common in overridden decisions including: a six-Justice ideologically conservative majority;[45]

35. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1420 (2014).

36. *Id.* at 1321.

37. *Id.* at 1319.

38. *Id.* at 1359.

39. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

40. Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29, 42 U.S.C.).

41. Christiansen & Eskridge, Jr., *supra* note 35, at 1381.

42. U.S. Senate Comm. on Health, Educ., Labor & Pensions, *supra* note 19.

43. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

44. Eskridge, Jr., *supra* note 34, at 352.

45. *Id.* at 353.

rejection of the EEOC's interpretation of sex discrimination under Title VII;[46] and reliance on the plain meaning of statutory text[47] and constitutional precedent.[48] In response, the Pregnancy Discrimination Act of 1978 aimed to restore women's rights by declaring pregnancy-based discrimination unlawful.[49]

More recently, the Court rejected the EEOC's statutory interpretation in *Ledbetter v. Goodyear Tire & Rubber Co.*,[50] prompting Congress to respond with the Lilly Ledbetter Fair Pay Act of 2009.[51] The day the Court handed down the *Ledbetter* decision, "[r]ed flags" indicative of an override "were flying all around" including: a five to four division among the Justices; rejection of a position long-held by the EEOC; significant narrowing of a regulatory scheme; adherence to a "plain meaning and whole code approach that denigrated legislative history arguments;" and a "plea for an override from the four dissenting Justices."[52] In her *Ledbetter* dissent, Justice Ginsburg referred to the Civil Rights Act of 1991, stating "[o]nce again, the ball is in Congress' court . . . to correct this Court's parsimonious reading of Title VII."[53] Doing just that, the Lilly Ledbetter Fair Pay Act of 2009 sought to restore women's right to equal pay. The Act "clarif[ied] that a discriminatory compensation decision or other practice that is unlawful under [Title VII and related Acts] occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes,"[54] increasing victims' opportunities to bring claims for discriminatory compensation.

The five "flags" indicative of an impending override were present in *Vance*: a five-Justice majority;[55] rejection of the EEOC's "nebulous"

46. *Gen. Elec. Co.*, 429 U.S. at 142–43 ("The EEOC guideline in question does not fare well under these standards. It is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title. More importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute. . . . There are also persuasive indications that the more recent EEOC guideline sharply conflicts with other indicia of the proper interpretation of the sex-discrimination provisions of Title VII.").

47. Eskridge, Jr., *supra* note 34, at 388 ("The Court rested its decision primarily upon a constitutional precedent which held that depriving women of pregnancy benefits was not gender-based discrimination prohibited by the Equal Protection Clause." (citation omitted)).

48. *Gen. Elec. Co.*, 429 U.S. at 145 ("The concept of 'discrimination,' of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to 'discriminate [] because of [] sex [],' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant[.]" (citations omitted)).

49. Christiansen & Eskridge, Jr., *supra* note 35, at 1335.

50. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

51. Christiansen & Eskridge, Jr., *supra* note 35, at 1449.

52. *Id.* at 1443.

53. *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

54. Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29, 42 U.S.C.).

55. Vance v. Ball State Univ., 133 S. Ct. 2434, 2438 (2013).

definition of supervisor;[56] narrowing of "supervisor" to exclude employees who control coworkers' day-to-day activities;[57] reliance on Title VII's nonuse of "supervisor;"[58] and an invitation from Justice Ginsburg to override—"[t]he ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."[59] With the *Vance* opinion "furiously waving all five red flags," members of Congress attempted to repeat the override pattern with FEPA in 2014.[60]

III. The Fair Employment Protection Act Would Not Have Been the Next Successful Congressional Override

Congressional overrides are signs of congressional health because these efforts are significant opportunities to update public policy to reflect current norms.[61] However, if congressional overrides are devised and implemented as knee-jerk reactions to the Court's decisions, the goal of changing public policy cannot be as readily accomplished. Instead, Congress should seize these opportunities fully by considering current workplace realities, judicial efficiency, and the likelihood of implementation by the courts and employers. Recognizing the concerns on both sides, Congress can effectively move public policy forward, clarify the law, and mitigate the chance that courts and employers will undermine these overrides.[62]

The Court's decision in *Ledbetter*[63] illustrates the unfortunate reality that many restorative overrides do not accomplish Congress' intended goals for new legislation.[64] The scenario, referred to as the "Lilly Ledbetter problem," arises when the Court interprets an override as leaving it with the option to apply an *overridden* holding in situations not explicitly covered by the language of the new statute.[65] For example, in *Ledbetter*, the Court decided that those claiming unequal pay under Title VII must file their claims within 180 or 300 days after the first paycheck

56. *Id.* at 2443.

57. *Id.* at 2455 (Ginsburg, J., dissenting) ("The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions.").

58. *Id.* at 2446 ("[P]etitioner is misguided in suggesting that we should approach the question presented here as if 'supervisor' were a statutory term. 'Supervisor' is not a term used by Congress in Title VII. Rather, the term was adopted by this Court in *Ellerth* and *Faragher* as a label for the class of employees whose misconduct may give rise to vicarious employer liability.").

59. *Id.* at 2466 (Ginsburg, J., dissenting).

60. Christiansen & Eskridge, Jr., *supra* note 35, at 1413.

61. *Id.* at 1322, 1414.

62. *Id.* at 1443.

63. *Ledbetter*, 550 U.S. at 618.

64. Christiansen & Eskridge, Jr., *supra* note 35, at 1443.

65. *Id.*

showing the unequal pay—a difficult burden to bear given that many claimants would not have the necessary access to their male coworkers' pay information to prove the discrepancy.[66] In reaching this decision, the Court relied on two authorities, *Lorance v. AT&T Technologies, Inc.*[67] and the Civil Rights Act of 1991.[68] First, the Court looked to *Lorance* because it too had imposed a burdensome time limit of 180 or 300 days on female employees' complaints about allegedly discriminatory seniority rules.[69] Second, the Court looked to the Civil Rights Act of 1991, which amended Title VII to provide a more employee-friendly time limit for seniority claims only.[70] Using these two authorities, the *Ledbetter* Court opined that the permissive limitation under the Civil Rights Act of 1991 did not apply to all sex or race discrimination claims (such as sex-based unequal pay), but only to seniority claims.[71]

Along with the *Ledbetter* Court, other courts have similarly resisted restorative overrides and relied instead upon overridden decisions.[72] Lower courts continue to cite the overridden *Lorance* decision with regard to statutes of limitations.[73] Furthermore, the Supreme Court continues to apply overridden decisions involving the Age Discrimination in Employment Act[74] ("ADEA").[75] For example, in *Gross v. FBL Financial Services, Inc.*,[76] the Court interpreted the ADEA "less liberally" than Title VII, and relied on *Price Waterhouse v. Hopkins*,[77] a decision explicitly overridden by the Civil Rights Act of 1991.[78] Again, in *Smith v. City of Jackson*,[79] the Court deliberately applied the overridden *Wards Cove Packing Co. v. Atonio*[80] decision over the Civil Rights Act of 1991 on the grounds that "[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the

66. *Id.* at 1442.

67. Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989).

68. Christiansen & Eskridge, Jr., *supra* note 35, at 1442.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1443.

73. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 546 (2009); *see, e.g.*, Lettis v. U.S. Postal Serv., 39 F. Supp. 2d 181, 195 (E.D.N.Y. 1998) (quoting *Lorance*, 490 U.S. at 907, without acknowledging the 1991 amendments, for the proposition that in determining when a statute of limitations begins to run, "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful").

74. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C.A. §§ 621–24 (West 2000 & Supp. 2008)).

75. Widiss, *supra* note 73, at 544.

76. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

77. *Lorance*, 490 U.S. at 228.

78. Christiansen & Eskridge, Jr., *supra* note 35, at 1443 n.445.

79. Smith v. City of Jackson, Miss. 544 U.S. 228, 240 (2005).

80. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."[81] The lesson to be learned through these examples is that Congress must recognize the ways in which courts respond to overrides and incorporate those realities into drafting new legislation.[82]

In relation to *Vance* and FEPA, learning from courts' conscious rejection of overrides is particularly important for two reasons. First, it is important because this problem arises most prominently in the context of workplace discrimination controversies that polarize the Court and Congress.[83] Second, there is a concern that courts will continue to apply *Vance* despite the protections of the Civil Rights Act of 1991 where "[t]he boldness of the five-Justice majority in [*Vance*] . . . suggests that the sting of the 1991 CRA rebuke has worn off and that the majority does not fear a congressional response."[84] Both suggest that Congress might be more successful if it chooses to respond carefully, not hastily.

A further issue is that the Court and Congress often diverge in their consideration of business realities. While business interests often succeed before the Court, the override process does not typically favor pro-employer interests.[85] Here, Congress' reversion to the pro-employee, pre-*Vance* definition of supervisor without much regard for the Court's reasoning for a more narrow definition is an example of the branches' split on the issue of business interests. With these competing interests, it would not be surprising if, following a new statutory override like FEPA, courts and employers would be resistant to these non-business-friendly, liability-expanding changes.

IV. The Need for a Non-Reactionary Override

To address the concerns presented in both *Vance* and FEPA, it is important that any override of the *Vance* decision be thoughtful, non-reactionary, and balanced. If Congress were to adopt such an approach when responding to the Court's narrow decisions, the repeated pendulum-like swing from narrow Court decisions to broad, policy-driven legislation, and back to judicial and employer resistance, could slow down, opening the door to sustainable progress.

Evaluating the majority's narrow interpretation of supervisor in *Vance*, the call for a response from Congress is justified because the decision is inconsistent with both the underlying intent and remedial

81. Widiss, *supra* note 73, at 547 n.162 (citation omitted).
82. Christiansen & Eskridge, Jr., *supra* note 35, at 1322–23.
83. *See id.* at 1443.
84. *Id.* at 1476.
85. *Id.* at 1380.

aims of Title VII.[86] Narrowing the class of supervisors whose actions can result in vicarious liability for the employer, *Vance* left fewer avenues through which employers could be held vicariously liable for workplace harassment, reducing employers' incentives to prevent discrimination and implement change in the workplace.[87]

With these long-standing principles of Title VII in mind, FEPA must also be evaluated in light of whether it could have actually carried out those aims in practice. Factors discussed thus far in this Note that would have cast doubt on FEPA's long-term effectiveness include: widespread liability being too unpredictable for courts; business interests being unaccounted for; and in pushing the pendulum as far as it can go, Congress often failing to address the practical concerns of enforcing new legislation. Even with these valid concerns, victims of workplace harassment must endure harsh realities that are more than troubling enough to shock the conscience into realizing that more needs to be done to protect lower-level employees from retaliation, and to ensure their access to redress.

A. Business and Workplace Realities

With the level of an employer's liability resting so heavily on the job titles and descriptions of its employees, it is important that legislation accurately reflect the modern-day workplace and consider the interests of both employers and employees. Modern workplace trends that should be considered include: a less "hierarchical management structure" and "overlapping authority [among employees] with respect to the assignment of work tasks," such that "[m]embers of a team may each have the responsibility for taking the lead with respect to a particular aspect of the work and thus may have the responsibility to direct each other in that area of responsibility."[88] Another reality is the lack of presence of "clearly supervisory employees . . . on the premises at all times . . . [such that] there will be no one around who is clearly a supervisor."[89]

The *Vance* majority responded to these realities in a manner that predominately benefitted employers. One such benefit under *Vance* is improved clarity as a result of a singular definition of supervisor. Employers are inclined to favor this narrower interpretation because it reduces the range of employees who may constitute supervisors, and thereby reduces the risk of vicarious liability.[90] Modern organizations are further drawn towards a more narrow definition of supervisor where

86. Lakisha A. Davis, *Who's the Boss? A Distinction Without a Difference*, 19 Barry L. Rev. 155, 172 (2013).

87. Vance v. Ball State Univ., 133 S. Ct. 2434, 2464–65 (2013) (Ginsburg, J., dissenting).

88. *Id.* at 2452.

89. Fisk, *supra* note 7, at 1404.

90. *Id.* at 1415.

employees have overlapping responsibilities and levels of authority are blurry.[91] Where a traditional hierarchical management structure does not apply or exist, and many employees have the power to assign tasks to one another, limiting the designation of supervisor to those who can take or suggest "tangible employment actions" allows for some added clarity in determining vicarious liability.[92]

This flattening of hierarchical employee structures, however, is not without consequences with regard to establishing a clear chain of command. Under these flatter structures, lower-level supervisors are taking on increasingly managerial roles and making decisions that affect employees' everyday work including: the maintenance of safety, cleanliness, and equipment; employee training and scheduling; and facilitating "human relations" counseling, union-management relations, and other external relations.[93] Though team-based structures typically engender notions of a collaborative and communicative work environment, these structures are arguably driving courts' determinations that harassers are mere coworkers, not supervisors. Furthermore, if employees were better informed of their supervisors' authority over them, victims of workplace harassment would likely feel more secure in their decisions to report harassment, knowing, for example, that their harasser is not actually authorized to take substantial retaliatory action against them.

With the majority's focus largely on employers' interests, *Vance* fell short of upholding the aims of Title VII, especially in light of the decreasing presence of clear supervisory authority and the increasing presence of lower-level supervisors.[94] For example, Justice Ginsburg found the modern-day, less hierarchical structure to be troubling for victims who *perceive* their harassers to have supervisory authority over them. She explained, "the definition of a supervisor that we now adopt is out of touch with the realities of the workplace, where individuals with the power to assign daily tasks are often regarded by other employees as supervisors."[95] Under this new standard, an employee who has endured harassment at the hands of someone whom he or she perceives to possess supervisory authority will be deprived of the greatest form of redress if the harasser did not possess "tangible employment action" authority. Instead, in order to prevail, a plaintiff harassed by an individual outside

91. *Vance*, 133 S. Ct. at 2452.

92. *Id.*

93. FATIMA GOSS GRAVES ET AL., NAT'L WOMEN'S LAW CTR., REALITY CHECK: SEVENTEEN MILLION REASONS LOW-WAGE WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT 5 (2014) (citations omitted).

94. Across the following fields: transportation; farming, forestry, and fishing; sales; personal care; cleaning and maintenance; and food preparation and services, for every 100 low-wage workers there are approximately eighteen lower-level supervisors and merely four managers. *Id.* at 9.

95. *Vance*, 133 S. Ct. at 2452.

the scope of this narrow definition is forced to prove the company's negligence in preventing or stopping the harassment.[96]

This new standard is troubling because these distinctions in authority do not lessen the detrimental impact of the harassment on the victim. Drawing the line for vicarious liability at a harasser's ability to take tangible employment actions is problematic for victims because in the "all-too-plain" reality of the workplace, "[a] supervisor with authority to control subordinates' daily work is no less aided in his harassment than is a supervisor with authority to fire, demote, or transfer."[97] An abuse of power capable of deterring resistance or reporting can arise from any level of vested power to control another's workplace activities, and is not limited to the authority possessed by the *Vance* category of supervisor.[98] This reality highlights the importance of the "apparent authority" supervisor discussed in Part V.B.

FEPA notably called attention to these concerns with the *Vance* decision as they affect vulnerable employee populations:

> Individuals who direct the daily work activities of employees but do not have the authority to take tangible employment actions against those employees are common in the workplace in the United States, particularly in industries that employ low-wage workers. Workers in industries including retail, restaurant, health care, housekeeping, and personal care, which may pay low wages and employ a large numbers of female workers, are particularly vulnerable to harassment by individuals who have the power to direct day-to-day work activities but lack the power to take tangible employment actions.[99]

Though *Vance* clearly has had an impact across industries, FEPA failed to balance these concerns with those important to the *Vance* majority. For example, the drafters did not provide any guidance as to how employers could implement policies and train employees in light of this broader liability, but without being overcome by the risk of litigation. FEPA also failed to address modern-day, "flattened" employee structures, which often blur the lines between supervisor and subordinate. Where the two branches refuse to acknowledge one another's concerns, the pendulum swings on.

B. JUDICIAL REALITIES

When interpreting Title VII, challenging questions should be resolved in a manner that is workable and does not overburden those who must implement the law. Actors likely to be overburdened in this area of law include courts, juries, employers, employees, and human resource professionals.

---

96. Fisk, *supra* note 7, at 1415.
97. *Vance*, 133 S. Ct. at 2458 (Ginsburg, J., dissenting).
98. *Id.*
99. Fair Employment Protection Act of 2014, H.R. 4227, 113th Cong. § 2(a)(15) (2d Sess. 2014).

Acknowledging these concerns, the *Vance* majority explained that its interpretation of supervisor is favorable because it can be "readily applied."[100] Justice Alito explained that prior to litigation, parties would be able to better determine the alleged harasser's status—supervisor or coworker—during discovery, assess the strength of the claim, and consider options for resolution.[101] Further, the single definition of supervisor will improve efficiency in the pre-litigation stage because the determination of the alleged harasser's status as a mere coworker, rather than a supervisor, will allow for earlier disposal of those cases.[102] When the alleged harasser's supervisory status is determined as a matter of law, parties will be able to focus their efforts on the applicable framework.[103] If the harasser is deemed a supervisor, then the defendant will have the burden of proving an affirmative defense.[104] In comparison, if the harasser is deemed a coworker, then the plaintiff will have the difficult burden of proving employer negligence.[105]

During litigation, this singular category of supervisors would allow for more straightforward factfinding, jury instructions, and analysis. For example, even if the question of supervisor versus coworker cannot be determined before trial because there is a genuine dispute about the harasser's authority, the question can be more readily resolved based on further analysis of any authority to take "tangible employment actions."[106] Chief Justice Roberts and Justice Alito agreed with this opinion, and during the oral argument in *Vance*, they praised the advantages of such a simple, narrow rule, including improved efficiency where courts would no longer have to sift through the facts in "countless cases" to determine supervisory status.[107] With regard to juries, there is a persistent concern that "unnecessarily complicated instructions complicate a jury's job in employment discrimination cases."[108] To resolve this complication, "more straightforward instructions [like *Vance*'s singular definition of supervisor] 'provid[e] the jury with clearer guidance of their mission.'"[109]

Despite these practical advantages, *Vance* falls short of preserving the aims of Title VII. As Justice Ginsburg noted in her dissent, establishing such a simple approach can detract from other goals of Title VII and the judicial system.[110] She explained that the Court, as it did in

100. *Vance*, 133 S. Ct. at 2438.
101. *Id.*
102. Davis, *supra* note 86, at 167.
103. *Vance*, 133 S. Ct. at 2450.
104. *Id.*
105. *Id.*
106. *Id.* at 2448.
107. Fisk, *supra* note 7, at 1418 (citation omitted).
108. *Vance*, 133 S. Ct. at 2451 n.13.
109. *Id.*
110. *Id.* at 2462.

Ledbetter, had once again sacrificed the protection against workplace discrimination sought by Congress in Title VII for the sake of "simplicity and administrability."[111] Challenging the majority's resistance to fact-finding, Justice Ginsburg noted that its focus on creating a simple rule for instant application was in conflict with the Court's usual consideration of the specific facts in Title VII cases.[112] Comparing the two primary questions in this line of cases—(1) whether the harassment or retaliation occurred, and (2) whether the alleged harasser is a supervisor or a coworker. Justice Ginsburg explained that both are subject to the same level of factual inquiry into the "constellation of surrounding circumstances, expectations, and relationships."[113]

Justice Ginsburg also criticized the majority's narrow gateway into vicarious liability for its burdensome impact on victims' ability and willingness to sue.[114] In the case of victims who have not been harassed by an individual with such explicit "tangible employment action" authority, their only means for redress will be proving employer negligence in failing to prevent or stop the harassment.[115] With this "steeper substantive and procedural hill to climb," Justice Ginsburg is concerned that victims will see filing a harassment claim as a "hazardous endeavor."[116] There is also the possibility that this narrow interpretation will reduce settlement amounts for victims because employers will not be as inclined to settle and employees will be more wary of pursuing trial for fear that their cases may be dismissed.[117] While the drafters of FEPA shared Justice Ginsburg's concerns, they did not give appropriate consideration to the efficiency arguments raised by the majority.

Similar to its failure to address business realities, FEPA also failed to acknowledge the Court's rationales for its narrow interpretation in favor of ready applicability. As an intended override of the *Vance* decision, FEPA could have addressed and incorporated either the majority's or the dissent's concerns. For example, it could have provided a means through which the majority's need for efficiency could be

111. *Id.*

112. *Id.* at 2463 ("The Court's focus on finding a definition of supervisor capable of instant application is at odds with the Court's ordinary emphasis on the importance of particular circumstances in Title VII cases. *See, e.g.*, *Burlington Northern* [& Santa Fe Ry. Co. v. White], 548 U.S. at 69, 126 S. Ct. 2405 [2006] ('[T]he significance of any given act of retaliation will often depend upon the particular circumstances.'); *Harris* [v. Forklift Sys., Inc.], 510 U.S. [17] at 23, 114 S. Ct. 367 [1993] ('[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.')"); *see also* Davis, *supra* note 86, at 167 (citing Patane v. Clark, 508 F.3d 106, 114 (2d Cir. 2007) (explaining that the question of "whether a particular work environment is objectively hostile is necessarily a fact-intensive inquiry")).

113. *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting) (citation omitted).

114. *Id.* at 2464 (Ginsburg, J., dissenting).

115. *Id.*

116. *Id.*

117. Davis, *supra* note 86, at 167.

carried out by a definitional standard, or explained more explicitly that the dissent's concerns regarding plaintiffs' difficult procedural battle are substantial enough to outweigh the majority's call for simplicity. Rather than address these concerns, the drafters reacted hastily—criticizing *Vance*[118] and reverting to the EEOC's previous definition of supervisor.[119] As a result, FEPA lacks a solid, well-rounded foundation as to why the two-prong definition of supervisor is integral to Title VII's role in the modern workplace.

Reviewing *Vance* and FEPA, each brought to light the successes and failures in attempts to answer the question—"Who is a supervisor?"—suggesting that neither offers the perfect solution. While the *Vance* majority did call attention to the legitimate interests of employers and courts, the Court seems to have forgotten the underlying aims of Title VII in the process. Conversely, Congress sought to uphold the aims of Title VII, but did so without regard for the challenges that come along with such expansive employer liability. In failing to incorporate the Court's concerns, Congress did not facilitate courts' and employers' ability to better address instances of harassment by supervisors as they arise.

Rather than engaging in a dialogue with the Court about creating a workable definition of supervisor, the drafters of FEPA changed the conversation to public policy and previous interpretations. If Congress could instead construct an approach for evaluating employer liability that better reflects current business and judicial realities, it could pave the way for a standard that neither leaves victims without adequate redress nor places an unrealistic burden on employers and courts.

C. Employees' Realities: "Between a Rock and a Hard Place"

Though Congress' reactionary effort to override the harm caused by the *Vance* decision failed, the harsh realities of harassment and abuse of authority are stark reminders that further action needed to fully protect employees under Title VII. Employees across industries, especially low-wage workers, find themselves "between a rock and a hard place" when they experience harassment in the workplace—choosing between the risk of losing their job after reporting the harassment, and the risk of unsuccessfully litigating their claims under the narrow *Vance* standard.[120] Both risks are all the more threatening to low-wage workers, who are least able to bear the costs associated with the risk of losing their employment and jeopardizing their financial stability.[121]

118. Fair Employment Protection Act of 2014, H.R. 4227, 113th Cong. § 2(a)(11), (14) (2d Sess. 2014).
119. *Id.* § 2(b).
120. Goss Graves et al., *supra* note 93, at 2.
121. *Id.* at 4–5.

Even before any of these difficult decisions are made, victims must first make the impossible split-second decision to resist their harasser, or give way to their harassers' force for fear of what might happen if they do not. One sector of employees facing these decisions far too regularly is agricultural-field workers. According to a recent study, eighty percent of 150 female farm workers in the California Central Valley reported that they had experienced sexual harassment, varying from unwanted touching to rape.[122] The uncertainty of what might happen next looms large for these workers, whose fears range from not being able to provide for their families to being deported.

The story of Maricruz Ladino is just one example of the experience of many agricultural workers who must make the same impossible choice between job stability and their physical and psychological well-being.[123] Ladino worked in the agricultural fields for nearly eighteen years, and endured the troubling power dynamic of mistreatment and abuse that pervades the agricultural fields.[124] She explained:

> One of the supervisors wanted me to go with him to check the crops. He insinuated that he wanted other things with me. One day we went to do an inspection in a field. He took the opportunity to abuse me. It happened in a place far from other people. I couldn't say anything. I couldn't even scream because it is very traumatic.[125]

Despite the personal impact and pain of this experience, Ladino hesitated to report the incident for fear of being seen by management as a "troublemaker."[126] She explained her hesitation: "If I said anything I would lose my job. I couldn't lose my job because I was the one taking care of my daughters."[127] Ladino is not alone in this battle between advocating for one's own safety and ensuring one's ability to provide shelter, food, and care for loved ones.[128] No one should have to make this choice, but where harassers continue to use their perceived or actual authority to threaten their way out of being reported, and employers continue to escape liability through vague employee structures and inadequate preventative and remedial measures, victims continue to suffer.

D. Realities in the Aftermath of *Vance*

Since the Court's decision in *Vance*, its narrow definition of supervisor has already been applied to "insulat[e] employers from direct responsibility for conduct by supervisors who lack the actual authority to

122. *Id.* at 4 nn.42–43.
123. *Id.* at 4 n.48 (citing *Frontline: Rape in the Fields* (PBS 2013)).
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 2.

hire and fire subordinates."[129] This limited avenue to vicarious liability poses a harsh reality for many employees, including Monica Fernando, a line cook in a fast food restaurant who was harassed and assaulted by her direct supervisor.[130] Fernando's supervisor could not take tangible employment actions, but he trained her, checked her work daily, and scheduled her shifts.[131] "Eventually, he raped her."[132] Under the new standard, Fernando's supervisor and many like him can be "recast" as mere coworkers despite their substantial control over their victims' everyday employment.[133]

In the aftermath of *Vance*, this recasting has started to take force. For example, Megan McCafferty, a fifteen-year-old McDonald's employee, faced this tragic reality when the Tenth Circuit dismissed her claim because her harasser was not authorized to take tangible employment actions.[134] After offering to drive McCafferty from school to work, Jacob Wayne Peterson, her shift supervisor, drove her to his friend's house instead and informed her that she could have the day off.[135] Peterson then allegedly sexually assaulted her for the next two days while "plying her with alcohol and drugs."[136] Applying the *Vance* standard, the Tenth Circuit determined that because Peterson did not have the authority to hire or fire employees, he did not qualify as a supervisor.[137] The court made this determination despite the reality that Peterson was often the most senior employee on duty during McCafferty's shifts, participated in the manager-in-training program, assigned duties, scheduled breaks, authorized overtime, and could send employees home for misconduct or when business was slow.[138] In situations like the one faced by the young Megan McCafferty, *Vance* unfortunately "gives cover to employers who bury their heads in the sand when it comes to how their entry-level workers are treated."[139]

Following *Vance*, employers can alter their employee structures to their benefit by strategically "concentrat[ing] hire and fire power in the hands of a few higher-level managers while dispersing substantial daily

129. ERA Staff, *What "Supervisor" (and the Fair Employment Protection Act) Means to Marginalized Women Workers*, EQUAL RTS. ADVOCATES (June 24, 2014), http://www.equalrights.org/what-supervisor-and-the-fair-employment-protection-act-means-to-marginalized-women-workers/ (last visited Aug. 5, 2016).

130. *Id.* At the time when this post was written, Monica Fernando was an Equal Rights Advocates client. Her name was changed for purposes of this Article.

131. *Id.*

132. *Id.*

133. *Id.*

134. GOSS GRAVES ET AL., *supra* note 93, at 14; McCafferty v. Preiss Enters., Inc., 534 F.App'x 726 (10th Cir. 2013).

135. GOSS GRAVES ET AL., *supra* note 93, at 14 (citation omitted).

136. *Id.* (citation omitted).

137. *Id.* (citation omitted).

138. *Id.* (citation omitted).

139. *Id.* at 11; *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013).

supervisory responsibilities among lower-level supervisors, whose harassment is far less likely to lead to employer liability."[140] In addition, attorneys are actively counseling corporate clients on ways to use *Vance* to their advantage. For example, one firm recommended that employers "consider strategic opportunities to capitalize on the *Vance* and *McCafferty* decisions by limiting the scope of authority that certain leaders possess in order to narrow the scope of [their] risk for vicarious supervisory liability," and "note the limitations in the updated job descriptions . . . in establishing the leader is not a 'supervisor' for Title VII purposes."[141] This recommendation is a clear indication that attorneys and employers are not hesitating to incorporate *Vance*'s narrow standard into decisions affecting their employees.

V. PROPOSAL: A TIERED APPROACH TO EMPLOYER LIABILITY

With a less reactionary response to the Court's narrow holding in *Vance*, Congress could construct legislation that successfully upholds the spirit of Title VII, but does not prompt resistance from courts and employers. This proposal, intended as a middle ground between *Vance* and FEPA, calls for a tiered approach to determining employers' liability based on the designation of the harasser in one of four categories, including: (1) "tangible employment action" supervisor; (2) "apparent authority" supervisor; (3) "day-to-day" supervisor; and (4) coworker. These four categories would have corresponding levels of liability for the employer: vicarious liability with an available affirmative defense[142] for categories one and two and negligence for categories three and four. Under this tiered structure, legislation could better accommodate workplace realities, employers' legitimate business interests, employees' need for genuine avenues of redress, and the judicial system's concern for efficiency, as discussed earlier in this Note.

This proposal represents a middle ground between *Vance*'s limited vicarious liability and FEPA's broad approach, by balancing the interests of employers and employees (victims) in light of the case-specific employment structure and supervisory dynamic. Where the risk of vicarious liability is significant for employers under FEPA's approach,

140. GOSS GRAVES ET AL., *supra* note 93, at 14.

141. *Id.* at 14, 22 n.129 (citing Christopher S. Thrutchley, *The Employer's Legal Resource: 10th Circuit Ruling Good Win for Employers, but . . .*, DOERNER, SAUNDERS, DANIEL & ANDERSON LLP LAWYERS (Sept. 3, 2013), http://www.dsda.com/News-Publications/Newsletters/25514/The-Employers-Legal-Resource-10th-Circuit-Ruling-a-Good-Win-for-Employers-but).

142. The affirmative defense available under this proposal is consistent with that which was applied by the Court in *Vance*. It establishes that an affirmative defense exists where the employer can prove "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided." *Vance*, 133 S. Ct. at 2442 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998)).

this proposal provides employers with the opportunity to escape liability by proving an affirmative defense in categories one and two. Categories three and four uphold the *Vance* majority's view that employers should not be held vicariously liable for the acts of "day-to-day" supervisors or mere coworkers.[143] This approach also serves the interests of victims, particularly through category two, which recognizes situations in which the victim's reasonable perception of the supervisor's authority was strong enough to dissuade the victim from reporting harassment or discrimination for fear of retaliation.

Where "[s]upervisors, like the workplaces they manage, come in all shapes and sizes," this structure would be more cognizant of modern organizational structures.[144] As the de-privatized "realm of the workplace" continues to evolve and take on different forms, a narrow definition of supervisor ignores the many scenarios in which harassment occurs.[145] Instead, a flexible approach will assist employees, employers, and courts in accurately evaluating Title VII claims and determining liability. In everyday business operations, human resource professionals could look to this framework when updating employee policies, investigating claims, conducting employee opinion surveys, or reevaluating current employee structures. With categories that acknowledge the vast differences across workplace environments, this proposal would better ensure that instances of harassment or discrimination are evaluated by means that are neither overly burdensome nor out of touch with the spirit of Title VII.

Furthermore, this organized structure would address the *Vance* majority's call for ready applicability by courts and employers alike. Prior to and during litigation, employers and employees (victims) could look to this framework when conducting discovery or strategizing with their respective counsel. During litigation, courts could compare the facts of a particular case to the features of each category, placing the harasser in the category that best fits the circumstances. With regard to analyzing a harasser's status and conduct, a tiered structure incorporating different levels of supervisory authority and employer liability will reduce the tension between judicial efficiency and comprehensive fact-finding. Where "[c]ontext is often key," courts need to examine the actual workplace relationship between the harasser and the victim.[146] Under this tiered approach, courts can evaluate which category the supervisor best

143. *Id.* at 2455 ("The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions."); *id.* at 2439 ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions.").

144. *Id.* at 2463.

145. Chamallas, *supra* note 3, at 162–63.

146. *Vance*, 133 S. Ct. at 2462.

fits into and proceed based on that designation to evaluate employer liability.

A. Category One: "Tangible Employment Action" Supervisor—Vicarious Liability with an Affirmative Defense

In this first category and consistent with *Vance*, an "employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim."[147] For this proposal, a tangible employment action retains the definition applied in *Vance*: "[A] significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[148] As a "defining characteristic" of supervisory authority, the power to take tangible employment actions is solid ground for vicarious liability because it is the means through which supervisors "bring[] the official power of the enterprise to bear on subordinates."[149] Further, this category aptly calls for vicarious liability because it applies to a distinct class of agents possessing the explicit authority to take employment actions against subordinate employees, rather than an "ill-defined class of employees who qualify as supervisors."[150]

When a harasser is deemed to fall within this first category, the employer will be vicariously liable if the harassing supervisor (1) ultimately takes a tangible employment action against the victim, or (2) creates a hostile work environment for which the employer cannot establish an affirmative defense.[151] Employer liability for a harasser's tangible employment action against the victim is justified because such an action is likely to require a company act and to have been documented by higher management.[152] Even if the supervisor has not yet taken a tangible employment action, the employer should be liable for the creation of a hostile work environment because a supervisor's vested power to take such an action injects a certain "threatening character" into her conduct.[153] However, it is sometimes unfair or unreasonable to rest ultimate liability with the employer. If the employer can successfully show an affirmative defense "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were provided," then the employer may avoid vicarious

147. *Id.* at 2439.
148. *Id.* at 2456 (citations omitted).
149. *Id.* at 2448 (citations omitted).
150. *Id.*
151. *Id.* at 2441–42.
152. *Id.* at 2442.
153. *Id.*

liability.[154] Otherwise, harassment by a "tangible employment action" supervisor will result in vicarious liability for the employer.

B. Category Two: "Apparent Authority" Supervisor—Vicarious Liability with an Affirmative Defense

In this second category of the tiered structure, a supervisor is defined as an employee with the apparent authority to take tangible employment actions against his or her victim. For the purposes of this category, apparent authority is defined as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."[155] As applied in the context of workplace harassment, this standard of apparent authority means: "the power held by [the harasser] to affect [an employer's] legal relations with [the victim] when [the victim] reasonably believes [the harasser] has authority to act on behalf of [the employer] and that belief is traceable to [the employer's] manifestations."[156] In effect, this category would account for claims by victims whom we could imagine saying, "If I *think* my harasser can fire me, that will affect me in the same way as if my harasser can actually fire me" or, "If my employer is going to allow me to think that my harasser can fire me, then it should be liable."[157] Under this standard, employers would be vicariously liable for the harassment committed by employees who have apparent authority to take tangible employment actions. However, they would retain the same opportunity to prove the affirmative defense as employers possess under category one.[158]

Both the EEOC and the courts have contemplated vicarious liability for harassment by employees with apparent authority.[159] The EEOC discussed such liability in circumstances where "the chains of command are unclear" or "the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command."[160] Courts have also recognized that

154. *Id.* (citation omitted); *see supra* note 142 (discussing the affirmative defense as provided in *Vance*).

155. Restatement (Third) of Agency § 2.03 (2006).

156. *Id.*

157. With respect to what "[the] employer is going to allow [the] victim to think," "manifestations" under the Restatement (Third) of Agency § 2.03 should also include omissions because there is also a likelihood that an employer's failure to inform the victim of other employees' designated roles and responsibilities could cause the victim to endure the harassment for fear of retaliation by the harasser.

158. Vance v. Ball State Univ., 133 S. Ct. 2434, 2442 (2013).

159. *See* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Order 205.001, Appendix B, Attachment 4 § a(5) (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html [hereinafter *EEOC Enforcement Guidance*].

160. *Id.*

in certain circumstances, apparent authority is an acceptable avenue for applying vicarious liability.[161] These acknowledgements suggest that apparent authority is a cognizable and powerful force in certain employment structures and should be addressed accordingly.

Within this category, the victim's claim will rely heavily on a case-specific factual inquiry, which is of crucial importance in workplace discrimination cases.[162] To obtain a comprehensive understanding of the employment dynamic leading to the harassment, this inquiry would call for extensive, yet targeted, discovery. Examination of the following would shed light on employment operations and standards: Testimony (from the victim, the harasser, similarly-situated coworkers, members of higher management, etc.); formal job titles and descriptions; employment policies and handbooks; employee training materials on harassment in the workplace; and documentation from any complaints or reports regarding the alleged harassment. This list of relevant evidentiary materials would assist employers, attorneys, and courts in incorporating this category of liability into a workable standard.

Access to such an extensive list of sources is important to this inquiry because, as asserted by Justice Ginsburg, a determination of supervisor status requires an examination of the specific facts of the workplace relationship, not merely the titles or job descriptions of the employees.[163] For employers, awareness of this standard would encourage transparency in the workplace, prompting employers to draw clear lines between levels of employees in order to avoid liability for the actions of apparent authority supervisors (where it was reasonable for the victim to believe that the harasser could take tangible employment action against him or her). Even though this inquiry is time-intensive and fact-specific, courts partial to business interests may nevertheless accept this category, recognizing these evidentiary sources as opportunities for employers to mitigate the risk of vicarious liability. During trial, this list would provide specific items for attorneys, judges, and jurors to consider when determining whether the harasser had a sufficient level of apparent authority to take "tangible employment actions." As a result, courts will be able to evaluate the evidence and arguments for and against a finding of apparent authority with increased clarity, and subsequently dismiss claims that do not satisfy this standard. Given these considerations, this

161. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 ("If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one."); *see also* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1247 n.20 (11th Cir. 1998) ("Although the employer may argue that the employee had no actual authority to take the employment action against the plaintiff, apparent authority serves just as well to impute liability to the employer for the employee's action.").

162. *Vance*, 133 S. Ct. at 2463 (Ginsburg, J., dissenting).

163. *Id.* at 2454.

more extensive factual and evidentiary inquiry would benefit employers, victims, and courts in their mutual interest to achieve efficiency.

The "apparent authority" supervisor is a justifiable addition to the employer liability scheme under *Vance*. Though this category is not as limited as the Court's narrow definition in *Vance*, it still comports with the Court's emphasis on needing *something more* than the ability to direct another's tasks for a finding of vicarious liability.[164] In this context, an alleged supervisor's apparent authority provides the *something more* that the majority sought. To illustrate, if the employer has not clearly drawn the lines of an employee's authority, then the harasser in a perceived supervisory capacity is no less empowered by that apparent authority when harassing others. As demonstrated by this illustration and the justifications provided below, the apparent authority supervisor would be an important addition to the Title VII framework because it calls attention to certain undeniable realities of the modern workplace.

A further point in favor of vicarious liability is that the threat of such liability incentivizes employers to conduct preventative trainings about workplace harassment.[165] Under *Vance*, the goals of vicarious liability, including redress for employees, would only be carried out to the extent that they apply to "tangible employment action" supervisors—excluding those who do not have such authority but do control the work activities and schedules of other employees, like Monica Fernando discussed above in Part IV.D.[166] In comparison, under this category of *extended* vicarious liability, employers would be incentivized to prevent and guard against misconduct by screening, training, and monitoring a broader range of employees.[167] Where vicarious liability is recognized as a "cost of doing business," employers should take responsibility, especially where that cost arises from an employer's own failure to both inform potential victims of their rights and obligations in the face of harassment, and develop a structure in which employees cannot abuse their actual or apparent authority.[168]

Given that the Court's narrow definition of supervisor in *Vance* has substantially minimized the possibility of vicarious liability, this apparent authority category would be of significant benefit to future victims of workplace harassment.[169] Under *Vance*, if a victim cannot prove that her harasser possessed "tangible employment action" authority, she is left with

164. *Id.* at 2448.

165. Davis, *supra* note 86, at 168.

166. *Vance*, 133 S. Ct. at 2464–65.

167. *Id.* at 2464 (citation omitted).

168. Faragher v. City of Boca Raton, 524 U.S. 775, 798 (1998) ("An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim.").

169. Davis, *supra* note 86, at 167.

only a negligence claim, which requires her to prove "that the employer knew or should have known" about the harasser's misconduct.[170] The task of proving employer negligence is difficult for victims because specific evidence of negligence can be difficult to discover and "[an] employer's failure to adopt a precaution might lurk in the background."[171] Where "[a]nyone engaged in the practice of law knows that negligence causes of action are generally more difficult to prove than strict and vicarious liability cases," extending vicarious liability to harassers with apparent authority will help preserve victims' opportunities for redress.[172]

The workplace environment itself provides further justification for the inclusion of an "apparent authority" supervisor within the scheme of vicarious liability. It has been said that "'the man in the street' thinks of a corporation with its officers and employees as an identifiable unity, as in '*[t]hey* ought to pay.'"[173] In this context, employers "ought to pay" when a victim reasonably believes there is an "identifiable unity" between the employer and the harasser. Power dynamics and deference to authority further support the notion of apparent authority, especially where employers have not educated employees on proper workplace interactions and hierarchies. Professor Martha Chamallas discussed such deference in terms of "children and other vulnerable populations . . . expected to defer to authority figures [such as] police, guards, teachers, coaches, or doctors."[174] This concept can be applied to the workplace, where vulnerable groups, including women, minorities, and subordinate employees experience "a special risk that . . . deference will facilitate abuse."[175] Where a supervisor is able to take tangible employment actions against her victim, the victim will likely defer to such authority and refrain from reporting for fear of retaliation. Extending this analogy further, a harasser with apparent authority to take such actions will receive the same level of deference and complacency from her victim as one with the explicit authority to do so.

Relatedly, a harasser's ability to threaten "to alter a subordinate's terms or conditions of employment" further justifies the application of vicarious liability in the apparent authority context.[176] From the victim's reasonable perspective, whether the harasser actually or apparently has such authority over subordinates arguably "hangs as a threat over the victim" in the same way.[177] The comparison of harassment by coworkers as opposed to supervisors, as discussed by Justice Ginsburg, can also

170. *Id.*
171. Chamallas, *supra* note 3, at 153 (citation omitted).
172. Davis, *supra* note 86, at 167.
173. Chamallas, *supra* note 3, at 134–35 (citation omitted) (emphasis added).
174. *Id.* at 171–72.
175. *Id.*
176. Vance v. Ball State Univ., 133 S. Ct. 2434, 2448 (2013).
177. *Id.*

apply to harassment by those with apparent supervisory authority.[178] If harassed by a coworker, a victim can more easily walk away or tell the harasser to "buzz off."[179] In comparison, when the harasser has any authority, actual or apparent, to take some action against the victim, the victim will likely be reluctant to report, halted by the (actual or perceived) risk of an undesirable, unsafe, or disruptive assignment, transfer, workload, shift, demotion, or firing.[180]

In addition, enterprise risk and institutional liability also support the application of vicarious liability to this category because "in the modern world, injuries [including harassment] are the 'inevitable by-products of planned activities'" in the enterprise of the workplace.[181] As Professor Chamallas discussed, "[a]n enterprise 'fully causes' the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero."[182] Then, "even if an employee's tort is personally motivated, it is efficient to impose vicarious liability on the employer if the tort was caused at least in part by the employment relationship."[183] Similarly, institutional liability recognizes the employer's causal role in the creation or facilitation of the harm.[184] As it would relate to apparent authority, this causation arises where the employer has not sufficiently informed its employees (potential victims) that they need not fear retaliation or worry that a tangible employment action may result in the aftermath of harassment. Where an employer has allowed supervisor-like employees to proceed with apparent authority that they can abuse in harassing others, the "systemic nature of the problem" becomes evident.[185] These notions of enterprise risk and institutional liability arguably apply to the harassment cases discussed throughout this Note.

The purpose of this category is to reach a middle ground between *Vance* and FEPA's definitions of supervisor, extending vicarious liability further than *Vance*, but not too far. The Court has deemed vicarious liability to be justified where the employer is responsible for granting the tangible employment action that a harasser ultimately misuses against her victim.[186] Conversely, the Court has recognized that a fellow employee's mere "ability to direct" another's day-to-day activities does not give rise to the same level of liability for employers.[187] As applied, the

178. *Id.* at 2456.
179. *Id.*
180. *Id.*
181. Chamallas, *supra* note 3, at 156–57.
182. *Id.* at 152.
183. *Id.*
184. *Id.* at 172.
185. *Id.*
186. Davis, *supra* note 86, at 166.
187. *Id.*

use of apparent authority makes the line drawing between "tangible employment action" and "control of day-to-day activities" more favorable for victims and more acceptable to those seeking to uphold the spirit of Title VII. This is because the category would capture workplace scenarios where an employer has not officially granted this authority, but also has not satisfactorily informed employees of the true hierarchy of authority. When employers fail to inform of such a hierarchy, they have created a scenario in which one employee can abuse the victim's perception of his or her authority, and the victim, reasonably believing in that authority, does not report the harassment for fear of an employment action against himself or herself.

This category would likely extend vicarious liability to cases that fell outside the *Vance* definition but were highlighted by the dissent. In these cases, "[e]ach man's discriminatory harassment derived force from, and was facilitated by, the control reins he held."[188] As Justice Ginsburg appropriately noted, "[u]nder any fair reading of Title VII, in each of the illustrative cases, the superior employee should have been classified a supervisor whose conduct would trigger vicarious liability."[189] Two of these cases involved facts that arguably fit within the features of this category. First is the story of Clara Whitten,[190] whose manager told her on her first day of work that if she wanted approval for time off she had to "give [him] what [he] wanted."[191] After Whitten refused to meet the manager in an isolated storeroom, he reacted by doing the following: denying her the requested time off; instructing her to stay late and clean the store; and threatening to make her life a "living hell."[192] Though the manager did not have the authority to take tangible employment actions, he was able to control her day-to-day work activities.[193] Where the manager was often the highest-ranking employee in the store and both Whitten and the manager thought of him as her supervisor, it is clear that the manager used this apparent authority strategically.[194] Considering that the manager made the initial demand to "give [him] what [he] wanted" on Whitten's first day of work, it is evident that he took advantage of some level of perceived authority from the start.

Second is the story of Monika Starke,[195] a newly hired truck driver, who was to be paired with "lead drivers" for the duration of a twenty-

188. Vance v. Ball State Univ., 133 S. Ct. 2434, 2460 (2013).

189. *Id.*

190. Whitten v. Fred's, Inc., 601 F.3d 231 (4th Cir. 2010), *abrogated by* Vance v. Ball State Univ., 133 S. Ct. 2434 (2013).

191. *Vance*, 133 S. Ct. at 2459.

192. *Id.* at 2459–60.

193. *Id.* at 2460.

194. *Id.*

195. EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012).

eight-day on-the-road training trip.[196] These lead drivers did not have the authority to take tangible employment actions but did control activities during the trip (such as assigning tasks and scheduling rest stops) and, more importantly, were charged with "evaluat[ing] trainees' performance with a nonbinding pass or fail recommendation that could lead to full driver status."[197] Two lead drivers harassed Starke during the duration of her training.[198] The first "filled the cabin with vulgar sexual remarks."[199] The second "forced her into unwanted sex with him, an outrage to which she submitted, believing it necessary to gain a passing grade."[200] Based on Starke's belief that giving way to the driver's force was necessary to pass her training, the employer arguably afforded these drivers with at least some level of apparent authority given their role in deciding whether or not trainees passed. Focusing less on the reasonableness of Starke's belief and more on the training drivers' actions, this situation, like Clara Whitten's, arose when the victim was new to the employer and unaware of other employees' level of authority over her. If courts were to accept this apparent authority category, employers would follow suit—training and educating their employees more effectively in order to mitigate the risk of vicarious liability.

This category of apparent authority brings with it further benefits for both employees and employers. For employees, vicarious liability "saves the cost of investigating the existence of the untaken precaution and then litigating the negligence issue."[201] It would also "do a better job than a negligence regime in achieving . . . [the] goal of encouraging the employer's cost-justified risk-reducing measures."[202] If such risk-reduced measures are then implemented, there will ideally be fewer instances of harassment in the workplace. Professor Chamallas echoed this point, explaining that vicarious liability encourages employers to be creative in their search for ways to make the workplace safer.[203] For employers, this category suggests manageable steps to avoid vicarious liability. In developing a clear employee structure and training employees on the dynamics of that structure (such as who does and does not have "tangible employment action" authority over them), employers can mitigate the risk that a victim will successfully prove an apparent authority claim. In turn, this category then provides an additional benefit to better-informed

196. *Vance*, 133 S. Ct. at 2460; *see* Goss Graves et al., *supra* note 93, at 13–14, for a discussion of several similarly disturbing stories about female CRST Van Expedited, Inc. employees, who, like Monica Starke, were harassed and assaulted by lead drivers during their training trips.

197. *Vance*, 133 S. Ct. at 2460.

198. *Id.*

199. *Id.*

200. *Id.*

201. Chamallas, *supra* note 3, at 153.

202. *Id.*

203. *Id.* at 152.

employees by empowering them to report instances of harassment without fear of "tangible employment action" retaliation.

In conjunction with such efforts to better structure and train employees, employers could further protect themselves from liability through increased use of indemnification. In application, indemnification would allow employers to avoid liability for the full extent of the harm caused by the harasser.[204] If employers were to exercise indemnity rights more regularly, vicarious liability could deter employees, informed of the indemnification policy, from engaging in harassment.[205] Exercising these rights would benefit employers where "it would seem that employers would want to distance themselves from the offending employee as much as possible."[206] Even though vicarious liability poses a greater risk to employers, it also provides them with an incentive to avoid liability. Conversely, the narrow definition provided by *Vance* will not only undercut initiatives to prevent harassment in the workplace, but will also lead to "imprudence by employers [that] will ultimately make them more vulnerable to harassment claims."[207]

C. Category Three: "Day to Day" Supervisor—Negligence Arising from Breach of a Duty to Act

Given the range of employee interactions that may lead to harassment in the workplace, the Court in *Vance* asserted that "[n]egligence provides the better framework for evaluating an employer's liability when a harassing employee lacks the power to take tangible employment actions."[208] Through its narrow definition of supervisor, the Court broadened the scope of claims that will be reviewed under a negligence standard. For those viewing this more frequent escape from vicarious liability as problematic, the application of a truer negligence standard and a "duty to act" standard, which focuses on more tangible instances of employer negligence, would address concerns associated with lesser liability under negligence.

While there is no general duty to act in tort law,[209] such a duty may arise in light of certain exceptions.[210] Analogizing to tort law, there are

204. *Id.* at 154.

205. *Id.* at 153–54.

206. *Id.* at 154.

207. Davis, *supra* note 86, at 168.

208. Vance v. Ball State Univ., 133 S. Ct. 2434, 2448 (2013).

209. Restatement (Second) of Torts § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *see id.* § 315 ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.").

210. Restatement (Second) of Torts § 314 cmt. a (1965) ("The actor may have control of a third person, or of land or chattels, and be under a duty to exercise such control, as stated in §§ 316–20.");

certain circumstances in which employers should have a duty to take specific reasonable actions, such as the scenario in which day-to-day supervisors can significantly harm employees by way of harassment and retaliatory action. One such exception, section 317 of the Restatement (Second) of Torts, provides:

> A master[211] is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment[212] as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if . . . the servant . . is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or . . . is using a chattel of the master, and . . . the master . . . knows or has reason to know that he has the ability to control his servant, and . . . knows or should know of the necessity and opportunity for exercising such control.[213]

This duty, hereinafter referred to as the "section 317 duty," arises where an employee is acting *outside the scope of her employment* and either *intentionally* causes harm to others or *creates an unreasonable risk of bodily harm*, and can be readily applied to this context. Given the high unlikelihood that the scope of one's employment would include discrimination or harassment, mistreating another employee in this way would fall *outside the scope* of one's employment. Where harassment often involves the use of derogatory language, retaliatory actions, or other detrimental acts, the harasser's harm is likely to have been *intentional*. Extending the *risk of bodily harm* to include psychological or emotional harm, this breach of duty would cover workplace scenarios where the harasser is *creating a hostile environment* in which other employees (victims or others) are afraid to speak up for fear of their well-being, or report to higher management.

In most employment structures, the very nature of an employment relationship would satisfy section 317(a)(i)–(ii) because the employee is either on the premises owned by, or using the instrumentalities of, her employer. The employer's awareness of the ability to control the harassing employee, required by section 317(b)(i), arises from the employer's ability to take certain actions (such as tangible employment actions) against an employee for improper conduct. A more challenging

---

id. § 314 cmt. c. (1965) ("The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316–19.").

211. "Master" meaning "employer;" "Servant" meaning "employee." *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. a (2006) ("This Restatement does not use the terminology of 'master' and 'servant.'").

212. *Id.* § 7.07(2) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

213. RESTATEMENT (SECOND) OF TORTS § 317 (1965).

factor for victims to prove might be the employer's knowledge of the necessity and opportunity for control under section 317(b)(ii) given that the employer may be entirely unaware of the harassment. However, there is nonetheless a strong basis for the use of a section 317 analogy for proving employer negligence under Title VII.

Application of this third category is further warranted because it would provide victims with the opportunity to prove negligence that is specific to their employers' failure to prevent employees with day-to-day control from harassing others. For purposes of this category, "supervisor" would be defined as "an individual with the authority to direct the victim's daily work activities,"[214] excluding those whom the plaintiff has successfully proven to fall within the "apparent authority" category. Under this category, a duty to act would be reasonable because a special relationship akin to section 317 exists where the employer has made a day-to-day supervisor a proxy for itself. Where higher management cannot be physically present at every worksite or in every store location, the employer selects certain employees to manage the day-to-day operations of a particular workplace.[215] Having empowered their employees with this authority, employers should be expected to fulfill their section 317 duty by creating a system through which harassment in the workplace can be better prevented or reported.

Furthermore, this section 317 duty would require employers to train employees at all levels on matters including: their rights and obligations under existing workplace harassment laws; how to navigate the established reporting channels; and importantly, the company's employment structure and chain of authority. Accordingly, the determination of an employer's breach would be based on factors including the system of training and reporting it has in place, or should have, created. This connection between "day-to-day" supervisors and an employer's duty under the circumstances of the system created is important because acts of harassment by lower-level supervisors could be better prevented or reported if employees (potential victims) were better informed.

Several scenarios highlight the need for a category between mere coworkers and supervisors with actual or apparent authority to take "tangible employment actions." One example is a scenario in which "[m]embers of a team may each have the responsibility for taking the lead with respect to a particular aspect of the work and thus, may have the responsibility to direct each other in that area of responsibility."[216] Though this example falls outside of the scope of both category one (that is, the *Vance* Court's narrow holding) and category two (apparent

214. Fair Employment Protection Act of 2014, H.R. 4227, 113th Cong. § 2(b)(2) (2d Sess. 2014).

215. *See supra* text accompanying note 94. Goss GRAVES ET AL., *supra* note 93, at 9.

216. Vance v. Ball State Univ., 133 S Ct. 2434, 2452.

authority), the ability to direct another's work still contains a level of control that a harasser may abuse. It is not difficult to imagine, for example, a scenario in which an employee might be left "unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or by altering the work environment in objectionable ways."[217] Though Justice Alito asserted that a victim in such a situation could "simply" show negligence, it is not so simple for a victim to succeed on a negligence claim, as discussed earlier in Part IV.B of this Note.[218]

Even with the recognized difficulty in proving a negligence claim, the prominence of the negligence standard and the need for judicial efficiency suggest that this standard of proof does have a place in the scheme of liability for workplace harassment. In *Vance*, Justice Alito stated that, "[t]here is no reason why this [negligence] standard, if accompanied by proper instructions, cannot provide the same service in the context at issue here" as it provides to "tort plaintiffs in many other situations."[219] This category has the potential to fill this need for "proper instructions."

With breach so closely tied to employee training and transparency, this category would benefit employers, informing them of the avenues through which they might escape liability even under a negligence standard. Employers could act on this duty by clarifying the channels for reporting and providing information regarding employee hierarchy. As a result, employers could mitigate their own risks for breaching this duty while simultaneously supporting employees' ability to navigate this system and obtain redress for harm suffered.

D. Category Four: Coworker—Negligence

The fourth category would encompass all coworkers who do not have any actual or apparent authority to take tangible employment actions or to control the victim's day-to-day activities. Even pro-employee authorities like the EEOC have accepted and applied a negligence standard to instances of harassment or discrimination by coworkers.[220] For this category, "a plaintiff [may] still prevail by showing that his or her employer was negligent in failing to prevent harassment [by a non-supervisor] from

217. *Id.* at 2451.

218. *Id.* at 2438.

219. *Id.* at 2452.

220. *See* EEOC Enforcement Guidance, *supra* note 159, at I ("The Commission's long-standing guidance on employer liability for harassment by co-workers remains in effect—an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action."); *see also* 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

taking place."[221] A plaintiff would be able to prove negligence by pointing to her employer's failure to "monitor the workplace, . . . respond to complaints, [or] . . . provide a system for registering complaints" or an employer's "effective[] discourage[ment]" of complaint-filing.[222]

In practice, this fourth category would apply where it would not be reasonable for the victim to believe that the harasser possessed any supervisory power or control. In this scenario, a coworker "can inflict 'psychological injuries' by creating a hostile work environment, but [] 'cannot dock another's pay, nor . . . demote another.'" Under such circumstances, vicarious liability is improper because it would be too difficult for employers to monitor the actions of all employees working as coworkers.[223] For this reason, negligence is more appropriate because it imposes liability where "the employer knew or should have known about the conduct and failed to address it."[224]

CONCLUSION

Recognizing that the aims of Title VII are not guaranteed to fare well following a congressional override, Congress must approach any opportunity for an override with careful consideration of the concerns expressed by the actors involved—employers, employees, and courts. As it relates to the issue of employer liability, a tiered structure that reflects modern business as well as judicial and structural realities has the potential to reach a middle ground, acceptable to both pro-employer and pro-employee constituents. Resisting premature reactions and drafting more comprehensive legislative responses, Congress could pave the way for lasting progress and preserve the protective aims of Title VII by facilitating the *simplicity* sought by courts *and* acknowledging the *complex realities* of the modern-day workplace.

221. *Vance*, 133 S. Ct. at 2453.
222. *Id.*
223. *Id.* at 2448 (citation omitted).
224. Fisk, *supra* note 7, at 1406.